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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,
Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CROSS-RESPONDENT TRUCKEE-CARSON IRRIGATION DISTRICT

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BRIEF OF CROSS-RESPONDENT TRUCKEE-CARSON IRRIGATION DISTRICT

I

STATEMENT OF THE CASE

For an accurate and complete statement of the facts in this case, Truckee-Carson Irrigation District (hereinafter "TCID") refers the Court to the Statement of the Case set forth in its Brief of Petitioner filed December 16, 1982, in case No. 81-2276, *Truckee-Carson Irrigation District v. United States of America and Pyramid Lake Paiute Tribe of Indians,* and to the Statement of the Case set forth in the Brief of Petitioner in the case of *State of Nevada v. United States of America, et al.,* No. 81-2245.

In light of the arguments and inaccurate Statement of the Case presented in the Brief of Cross-Petitioner Pyramid Lake Paiute Tribe of Indians (hereinafter "the Tribe"), however, a more detailed presentation of the facts

surrounding decisions concerning the United States' claim in *United States v. Orr Water Ditch Co.*, Equity No. A-3 (hereinafter *"Orr Ditch"*) for reserved rights for the Pyramid Lake Indian Reservation (hereinafter "the Reservation") is warranted, and will be presented in the Argument. *See* especially pp. 5-21, *infra.*

Although the bulk of the Tribe's factual inaccuracies are addressed in the argument portion of this brief, there is one which is so unrelated to the issues before this Court as not to be conveniently discussed elsewhere, and yet is so misleading and inflammatory as to require a response.

The Tribe continues, as it did in its Opposition to TCID's Petition for Certiorari, to charge TCID's farmers on the Newlands Project with "wasteful practices" and "unnecessary diversions," citing as its sole support for these allegations the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1973). *See* Tribe's Brief at 11-12. Since TCID and the Project farmers were neither parties to that case, nor represented therein, and since the United States neglected to oppose the Tribe's assertions concerning TCID's "wasteful use of water," predictably those assertions were accepted by that court as true. By contrast, in two other cases where TCID *was* a party, the reasonableness of water use practices of the Newlands farmers has been upheld.

In *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980), the reasonableness of the Newlands farmers' water use was the principal issue. The Ninth Circuit has recently affirmed the trial court's finding that the farmers' use of 3.5 acre-feet per acre for bottomlands and 4.5 acre-feet per acre for benchlands (the same water duty determined by the Special Master in *Orr Ditch* and agreed to in the Truckee River Agreement) is reasonable and economical. *See United States v. Alpine Land & Reservoir Co., et al.*, Sl. Op. No. 81-4084 at 13.

And in the case at bench, a substantial portion of the Tribe's case was devoted to an attempt to show that, because of irrigation inefficiencies of the Newlands farmers, the Newlands Project water supply could be cut back considerably and the water savings devoted to maintenance of fish flows without substantial "harm or 'hurt'" to the Project farmers. The District Court specifically found that the Tribe had failed to prove its case. Nev. App. 191a.

II

SUMMARY OF ARGUMENT

The Tribe has asked this Court to void a comprehensive water rights decree rendered nearly 40 years ago at the culmination of a quiet title action begun 70 years ago. In its quest for judicial endorsement the Tribe has advanced two basic arguments, neither of which is factually or legally supportable in this case.

First, the Tribe has argued that the entire *Orr Ditch* decree should be declared a nullity because in that litigation the Tribe's interests were represented by a fiduciary saddled with an irreconcilable conflict of interest which it resolved against the Tribe. The Tribe has conveniently overlooked the critical facts which show that any decision to forego pursuit of a Reservation entitlement to fish flows was made wholly within the Office of Indian Affairs by executive officers untroubled by any dual interest. Further, given the facts and law of the era, that decision was rationally based. Regardless of what more than a half-century of hindsight may suggest about the wisdom or appropriateness of decisions made by the Office of Indian Affairs during the course of the *Orr Ditch* litigation, the fact remains that the Tribe's attempt to ascribe the decision to a conflict of interest is wholly unsupported by the record.

Assuming the Tribe could show a credible factual basis for its "conflict of interest" theory, however, retrospective

application of even modern due process principles to the facts of *Orr Ditch* does not provide any legal support for the remedy which the Tribe seeks. If the Tribe indeed suffered injury from its trustee's failure of duty, the appropriate, and available, remedy is an action for damages against the trustee—an avenue which, in fact, the Tribe has already successfully pursued before the Indian Claims Commission. The Tribe's attempt to wring additional recompense from thousands of innocent third parties lacks legal, as well as factual, support.

The second avenue by which the Tribe seeks to unravel the *Orr Ditch* decree is its argument, rejected by both courts below, that there exists a "fishery water right" claim which is separate from the Reservation's water right claim asserted in *Orr Ditch*. This argument, too, lacks both factual and legal basis. As a factual matter, the argument ignores the express injunctive language in the *Orr Ditch* Final Decree. *See* Nev. App. 145a. It also necessarily presupposes that the government attorneys, by consciously withholding a supposed "fishery water right" senior to virtually all other claims on the river, knowingly and deliberately engaged in thirty-one years of futile litigation which could produce no final rights. In addition to this logical absurdity, the Tribe's attempt to manufacture a separate "fishery water right" cause of action fails all legal tests, whether ancient or modern, conceivably applicable to the definition of "claim."

III

ARGUMENT

A. Enforcement Of The Orr Ditch Decree Through Principles Of Res Judicata Violates No Due Process Guarantee

The Tribe's basic argument, which permeates its entire brief, is that it would violate procedural due process guarantees to hold its claim for fish flows barred by the judg-

ment in *Orr Ditch*. The Tribe argues that the United States' dual representation of both the Newlands Reclamation Project and the Reservation's water rights in that case amounted to a "massive conflict" of interest which operated to deprive the Tribe of a full and fair opportunity to litigate its alleged "fishery water right." Tribe's Brief at 15. As will be shown below, the Tribe's argument is both factually and legally unsupportable.

1. There Is No Evidence That The Government's Failure To Pursue A Right To Fishery Flows In Orr Ditch Was Due To A Disabling Conflict Of Interest

Central to the Tribe's due process argument are two assumptions. First, that a "massive conflict" between the interests of the Newlands Project and the interests of the Reservation was the reason for the government's failure to pursue a claim for fish flows in *Orr Ditch*. The second assumption, upon which the first is necessarily founded, is that the federal government is an undifferentiated monolith. Both are false.

Because of its foundational importance to the Tribe's argument, this brief will first address the Tribe's perception of the federal government as a unitary entity.

In order to prevail in its due process argument, the Tribe must show that "an actual conflict of interest adversely affected [its] lawyer's performance," *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To meet its burden of proof, then, it must demonstrate that the federal decisionmaker responsible for the failure to pursue a fishery claim in *Orr Ditch* was also responsible for the success of the Newlands Project; in other words, that the decision was made by an agency of government in which such a conflict existed.

The record clearly shows, however, that the *only* awareness or discussion of any potential claim for fish flows occurred after the trial of *Orr Ditch* had concluded, and occurred wholly within the Office of Indian Affairs, which was solely responsible for any decision not to pursue the claim. The Office of Indian Affairs was not, and could not have been, under any "disabling conflict."

The management and direction of "all Indian affairs, and of all matters arising out of Indian relations" was entrusted by Congress to the Commissioner of Indian Affairs by Act of July 9, 1832, ch. 760. 8 Laws of the United States at 654, 655. The only responsibilities vested in the Office of Indian Affairs [predecessor to today's Bureau of Indian Affairs] were to safeguard the welfare of the various Indian tribes and to manage the trust property set aside for their use. *Poafpybitty v. Skelly Oil Company*, 390 U.S. 365, 374 (1968). Although the Office of Indian Affairs was placed within the Department of the Interior, as was later the Reclamation Service, Act of March 3, 1849, ch. 108; 43 U.S.C. § 373, its responsibility has always been solely to manage Indian affairs, *Armstrong v. United States*, 306 F.2d 520 (10th Cir. 1962), a principal aspect of which is management of trust property.[1]

Given the unalloyed responsibility of the Office of Indian Affairs, the Tribe's attempt to attribute the failure to pursue the fishery claim to anonymous "federal officials" or to "the United States" as a whole is, perhaps, understandable. It does not, however, accurately reflect the evidence.

The other premise on which the Tribe's due process argument is grounded is the assumption that a conflict of

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[1]The Tribe has never suggested, nor could it, that either the Commissioner of Indian Affairs or the Office of Indian Affairs was subject to any conflict of interest regarding the water rights for the Reservation.

interest was the reason the fishery claim was not pursued. While the Tribe attempts to support this theory throughout its brief, its characterization of the facts is not only misleading, it is also internally inconsistent.

The Tribe states that "government officials were aware of the potential claim of a [fishery] water right," which "was discussed extensively," but "was not asserted . . . because of the larger interest [in reclamation]" and that "[n]o one ever suggested the claim was not meritorious." Tribe's Brief at 9. Finally the Tribe asserts that "[t]he United States *limited its claims* on behalf of the Pyramid Lake Indian Reservation." (Emphasis added.) Tribe's Brief at 8; *see also id.* at 27, 33, 40, 41.

Curiously, even while it asserts that "government officials" were aware of the potential fishery claim but that "the United States" limited its Reservation claim in *Orr Ditch* because of the Newlands Project, the Tribe admits elsewhere that "the government's attorneys were not aware of the conflicting fishery claim until after the close of evidence," Tribe's Brief at 30 n.17[2], and that "the first mention of the possibility of claiming a fishery water right for the Pyramid Lake Reservation was in a letter [wholly internal to the Office of Indian Affairs] written in 1922, almost a year after the close of evidence in the *Orr Ditch* trial." Tribe's Brief at 27 n.15. It also concedes that by the time the government attorneys became aware of any potential fishery claim there were "severe practical constraints on any effort to assert new claims to significant quantities of water." Tribe's Brief at 30 n.17.

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[2]Inconsistently, the Tribe also asserts at the same time that "the *Orr Ditch defendants or their attorneys* knew or should have known" about the potential conflicting fishery water right claim of the United States by virtue of prior or contemporaneous court decisions concerning Indians, fish, water and the Pyramid Lake Reservation. (Emphasis added.) Tribe's Brief at 34 n.20.

The above recitation demonstrates the Tribe's schizophrenic view of the *Orr Ditch* litigation. In essence, it claims that the United States, in order to avoid a conflict with the Newlands Project right it was claiming in *Orr Ditch*, consciously refused to assert a fishery claim of which it was not even aware until after the case had been tried. That the record does not support the Tribe's distorted perception of the *Orr Ditch* case is not surprising. What the record does show is that the failure of the government to pursue a fishery claim in *Orr Ditch* was the product of policies and decisions wholly internal to the Office of Indian Affairs, which was fully informed and consulted concerning the water right to be sought on behalf of the Reservation.

a. The Office Of Indian Affairs Participated In The Formulation And Approved The Claim Made On Behalf Of The Reservation

The *Orr Ditch* litigation was instituted by the Attorney General at the direction of the Secretary of the Interior, who initially requested that the suit determine "all water rights in Lake Tahoe and Truckee River above the intake of the Truckee-Carson Reclamation Project." JA 263.[3] In early 1913, John Truesdell, the Special Assistant to the Attorney General assigned to the matter, prepared a lengthy and comprehensive memorandum discussing various aspects of the federal government's potential water claims on the Carson and Truckee Rivers and in Lake Tahoe, both in California and Nevada. Exh. U-10, RT 1042, 1059. In discussing the Reservation's claim, Truesdell noted various questions which would affect the claim including

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[3]Pursuant to this Court's Rule 34.5, an Appendix to this brief shows the place in the record where each exhibit reproduced in the Joint Appendix (hereinafter "JA") and referred to in this brief was offered and admitted into evidence.

> the circumstances surrounding the establishment of the reservation, including the treaties, if any, the executive order or act of Congress setting the land aside, the number of persons in the tribe, and whether the reservation was for the whole tribe or for several tribes, etc., etc. . . .

JA 268. He particularly pointed out the pervasive doubts concerning two major issues. First, he questioned whether reserved rights could be claimed for Indian Reservations established "as this was, by executive order." JA 266. Second, he pointed out the undetermined extent of such rights, JA 267, *i.e.*, whether they included only water to irrigate lands already irrigated; only water for sufficient lands for the individual Indians "for which the reservation was made and their reasonable increase, when living on allotments such as it has been the custom for the Government to make," JA 267; or "enough water to irrigate all of the land." JA 268. It was Truesdell's opinion that the Reservation rights "should be established to the fullest extent." JA 269.

The same month Truesdell was analyzing the Government's claims to water from the Truckee River, the Acting Director of the Reclamation Service, by letter dated January 20, 1913, notified the Commissioner of Indian Affairs that he had requested Truesdell to include the Reservation's rights as well as the Newlands rights in the adjudication. JA 271-272; *See also* Exh. U-11, RT 1042, 1059. The letter specifically identified the documents which had been furnished Truesdell concerning the establishment of the Reservation and included the Reclamation Service's estimate of irrigable acreage on the Reservation. Finally, the letter requested the Office of Indian Affairs to furnish whatever additional information it might have and to meet with Truesdell on the matter. JA 271-272.

About two weeks later Truesdell reiterated the invitation. By letter dated February 1, 1913, he informed the Commissioner's designated representative that "before this suit is brought I should like very much if possible to have a conference with you as to the rights in connection with the Indian Reservation, and the best method of protecting them in that suit." JA 276-277. Truesdell also outlined both his intention to claim "as large a right for the reservation lands as possible," JA 277, and the anticipated grounds for objection to a Reservation right. *Id.* About one month later, on March 3, 1913, Truesdell initiated the *Orr Ditch* litigation.

Just prior to trial, Truesdell again wrote the Commissioner of Indian Affairs specifying the precise claim which he planned to present on behalf of the Reservation—a *Winters* doctrine claim for a water right sufficient to irrigate about 5400 acres: 3000 acres of benchland (computed by multiplying the five-acre allotments provided for by Congress in its Act of April 21, 1904, by the approximately 600 Indians on the Reservation) and 2400 acres of bottomland. JA 315. Truesdell noted that "all this has been carefully discussed by Mr. Withers [the Justice Department attorney in local charge of the *Orr Ditch* case] with the Superintendent of the reservation and I have no doubt has been called to your attention," JA 316, but that, "to be sure that our plans in this respect meet with your approval, and to give the opportunity to make any suggestions or give us any directions that you have, I am writing this letter." *Id.*

The *Orr Ditch* case was tried between 1919 and 1921 and was argued to the court in September 1922. JA 397-398.

There is no indication in the evidence that the government attorneys claimed for the Reservation any smaller water right than the maximum they believed possible, or that their formulation of that claim was influenced in any

way by the upstream irrigation demand of the Newlands Project. To the contrary, the evidence shows that it was the Reclamation Service itself that urged assertion of the reserved right claim, notwithstanding doubts as to its validity. Exh. U-11, RT 1042, 1059. Additionally, the record shows continuing consultation by the government's *Orr Ditch* attorneys with the Commissioner of Indian Affairs, with his designated local representative, and with the Superintendent of the Reservation, in the course of formulating the claim to be asserted for the Reservation. JA 276-277, 314-316. In spite of the ample opportunities afforded the Office of Indian Affairs, there is no evidence it ever suggested that any greater right should be sought or that a right should be pursued for fishery purposes. Even the Tribe admits that the first mention of a fish flow claim occurred after trial, in 1922, *see* Tribe's Brief at 27 n.15, and even then only in documents wholly internal to the Office of Indian Affairs. *See* pp. 13-14, *infra*.

b. The Office Of Indian Affairs Never Sought Fishery Flows For The Reservation Despite The Known Decline Of The Fishery

By 1922, the Pyramid Lake cutthroat trout had been "decreasing for years." JA 318.[4] The decline was widely known and its causes widely speculated upon,[5] but only one individual at the time conceived that an instream water right for fish flows might be either necessary or possible. Lorenzo Creel, an employee of the local Office of

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[4]Special Supervisor of the Reno Indian Agency, Lorenzo Creel, wrote in 1922 that he had been concerned about "the fish problem . . . since my connection with the reservation in 1910." JA 321.

[5]These speculations included overfishing by both Indians and whites, depredation by pelicans, and inadequate flows, JA 318-319, the effects of irrigation diversions, sawmill debris and pollution, JA 325-332, pollution from mills, sewage and the absence of fish ladders and fish screens on irrigation works, JA 348-356. *See also* JA 359-361.

Indian Affairs, in a January 18, 1922, "advance report" of the Reservation's fishery, concluded that the Indians might argue for "a prior right to sufficient water from the Truckee River to enable those trout to reach their natural spawning beds." JA 321-324. Creel saw the question as sufficiently important that he submitted his "advance report" directly to the Commissioner of Indian Affairs, recommending that the matter "be taken up at once" so that Truesdell and Withers, the Justice Department attorneys handling *Orr Ditch*, could be asked to claim the additional water for the Reservation in the *Orr Ditch* litigation. JA 323. On January 28, 1928, Creel submitted a final report containing the same recommendation to his immediate superior who, in turn, transmitted it to the Commissioner of Indian Affairs. JA 325-335.

The response from the Acting Commissioner of Indian Affairs, in May 1922, was less than whole-hearted endorsement. With regard to Creel's suggestion that the Indians might have a water right for fish flows, the Commissioner wrote "This phase of the matter will be investigated with the view of taking such action, if any, as the law and facts may justify." JA 339. And the Commissioner's general attitude toward the fishery was also qualified:

> The Office appreciates Mr. Creel's thorough and comprehensive report on this matter and is, of course, disposed to do everything it can to protect the fish, not only for the benefit of the Indians, but of the white population as well, *so far as consistent with the larger interests involved in the proposition having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole.* (Emphasis added.)

JA 341. *See also* JA 342-343. While the Commissioner did follow up on several other of Creel's recommendations concerning fish ladders, fish screens and possible reloca-

tion of the power plant, JA 342, 343, no action was ever taken by the Commissioner with respect to Creel's recommendation that fish flows be sought in *Orr Ditch*. There is no evidence that the matter ever left the Commissioner's Office. There is no evidence that any Indian Affairs officers responsible for policy decisions ever requested the attorneys to make such a claim or even discussed it with them,[6] even though they knew fish flows were not being sought in the litigation.

This lack of support frustrated certain local employees of the agency. Three years after Creel's first letter, the Superintendent of the Reno Indian Agency wrote the Commissioner of Indian Affairs that

> the attention of your Office is again called to the fact that something definite should be done about the protection of the water and water rights of the Pyramid Lake Indians.
>
> This matter has been up for years and your Office is filled with data on the subject; but each year the Indians lose more and more water. It would appear that their rights are not being properly protected.

JA 385.

The foregoing chronology demonstrates that the Tribe's representation that "the [fishery] claim was discussed ex-

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[6]As to the awareness of the United States attorneys of any potential claim for fish flows, the record shows only that Creel, a local Indian agency employee, inquired whether such a claim had been made and was told by Mr. Withers that it had not been raised in his brief. JA 323. On the other hand, the evidence shows that the same attorneys had already sought direction and approval for the claim made from Creel's ultimate superior, the Commissioner of Indian Affairs, and that the existence and extent of even reserved irrigation rights for the Reservation were subject to question. JA 265-266, 276-277, 314-316, 421-423.

tensively . . ." and that "[n]o one in the government ever suggested that the claim was not meritorious," Tribe's Brief at 9, is pure fantasy. In fact, the chronology demonstrates that the claim was "discussed" only in correspondence internal to the Office of Indian Affairs and the concept was apparently rejected by the Commissioner of Indian Affairs, the official in charge.

There are a number of non-nefarious explanations why the Commissioner of Indian Affairs may have decided not to pursue a fish flow claim in *Orr Ditch:*

First, the problem appeared amenable to physical solutions alone, such as construction of a fish channel through the Truckee River delta and fish ladders and screens on up-stream irrigation facilities. *See* JA 357, 359-361.

Second, the amount of water needed appeared small, JA 394, and obtainable either through increased upstream irrigation efficiency expected to result from the litigation, JA 282, 360, 363, or through enforcement of the decree against the private irrigators once their rights were determined by the litigation. JA 432, 434, 461.

Third, the fish flow problems may have been perceived to be the result of the prolonged drought in the area, a condition which would remedy itself naturally in time. JA 353-354, 404, 434, 447, 457.

Finally, Congressional policy, as it was then perceived, JA 381-383, was to turn the Indians from their "wild and nomadic habits," JA 381, and to encourage them to adopt pastoral and agricultural pursuits with which they could better be assimilated into the general culture. *Id.; see also* JA 436, 515-517. The Indians' "ultimate welfare" was viewed as dependent upon their successful pursuit of different means of livelihood from their ancient customs, and the maintenance of the Reservation for their traditional pursuits of hunting and fishing was seen as incompatible. JA 437.

Whether the above perceptions were correct or incorrect is irrelevant. What is relevant is that they represent valid reasons why the agency charged *solely* with the welfare of the Indians may have decided, as it did, not to pursue a right for fish flows in the *Orr Ditch* litigation. Whatever the reason may have been, it is clear from the evidence that the decision was *not* made by *Orr Ditch* attorneys representing both the Newlands and Reservation claims, but was made by an agency untroubled by any conflict of interest.

The *Orr Ditch* temporary restraining order was entered in 1925 and left open for modification. Significantly, during this period the Office of Indian Affairs negotiated directly with TCID and other local interests and obtained a right to almost twice as much water for irrigation as the Reservation had been awarded by the court, by increasing the water duty entitlement and almost doubling the acreage irrigable under the 1859 priority. TCID App. A-158-160; *see also* Brief of Petitioner TCID at 23-24. Yet it still did not request recognition of even minimal fish flow rights in the Truckee River Agreement.

It is clear that while this course of action was being pursued, the Commissioner of Indian Affairs was aware that "every drop" of water available would be utilized by the Reclamation Service for irrigation, and that the failure to pursue fish flows in *Orr Ditch* would preclude later attempts to obtain assured fish flows from the Truckee River. JA 322, 323, 324, 424, 429, 435, 444, 455-457, 472.

c. No Government Official Outside the Office of Indian Affairs Was Aware of or Opposed the Assertion of a Fishery Flow Right

The Reclamation Service never attempted to influence the size or nature of the claim made on behalf of the Reservation. In fact, it appears from the record that it was the Director of the Reclamation Service who first suggested that the Reservation's claim be included in the adjudication and that the Office of Indian Affairs consult

with the United States attorney regarding the claim to be made. JA 271-272; Exh. U-11, RT 1042, 1059.[7] There is no evidence to support the Tribe's assertion that either Reclamation or the Newlands farmers "insisted on" or even sought the government's "undivided allegiance." Tribe's Brief at 27 n.16. Further, Exhibit U-242, RT 1047, 1059, cited by the Tribe to support that assertion, has not even speculative or tangential connection with the proposition. *See id.*

During the course of the adversary arms-length negotiations for the Truckee River Agreement, the Reclamation

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[7]The Tribe represents that "tribal members were assured by the Commissioner of Reclamation that his Bureau would 'carefully guard against taking any action that would impair the right of the Indians to water for fishing,'" Tribe's Brief at 8-9, 39, relying for support on a quotation from the Ninth Circuit's opinion. That quotation was taken completely out of context from Exhibit A-360, RT 4501, 4583, a February 14, 1925, letter from Elwood Mead, the Commissioner of Reclamation, to the Commissioner of Indian Affairs. TCID is unaware of any evidence of communication directly between the Bureau of Reclamation and the Indians or the Tribe. The letter apparently responds to allegations that diversions of water for Newlands were interfering with flows for fish. In that letter Mead points out that during the period in question the Truckee River was *dry* except for stored water pumped from Lake Tahoe by Reclamation. At the time the letter was written the *Orr Ditch* trial had been concluded and the parties were still awaiting a decision in the case. Mead points out that the rights of the Newlands Project, the Indians and the other water users would be "fully determined by the court" in *Orr Ditch* and that "until that occurs . . . no one . . . can say with certainty precisely what rights the Indians are entitled to enjoy." He concludes, "I believe it is superfluous to add that this Bureau will carefully guard against taking any action which would impair the right of the Indians to waters of the Truckee River for fishing or other beneficial uses." In context, then, the letter represents only a commitment by Reclamation to respect the Indians' rights *as those rights are determined by the court in the Orr Ditch case.*

Service maintained a policy of non-involvement and directed the private parties and TCID to negotiate directly with the Office of Indian Affairs concerning the Reservation claim. JA 465-466, 469.

The only other government officials who had any responsibility for formulating and asserting the government's claim on behalf of the Reservation were the Justice Department attorneys. The District Court specifically found that "the good faith or motives of said government counsel is not questioned by [the United States] and the Tribe in this proceeding." Nev.App. 190a. In closing argument after trial, the Tribe's counsel admitted that the actions of the United States attorneys and federal officials in *Orr Ditch* were "reasonable" given "the circumstances in which they were placed and also given the law with which they can be presumed to [have been] familiar." RT 9603-9604. And the Tribe concedes that "the government attorneys were not aware of the conflicting fishery claim until after the close of evidence in the *Orr Ditch* trial." Tribe's Brief at 30 n.17.

Nevertheless, the Tribe asserts that these same government attorneys

> took great pains to insure that the irrigation water right asserted for the Reservation would not conflict with the right sought for the Newlands Project . . . and they refused to bring any matter to the Court's attention that pitted the interests of the Indians against those of the Newlands Project. . . . The water users on the Newlands Project insisted on the government's undivided allegiance.

Tribe's Brief at 27 n.16.

Because these statements impugn the integrity and adequacy of the Justice Department attorneys with regard to the Reservation claim advanced, their inaccuracy must

be addressed. There is no evidence that the government attorneys "took great pains" to avoid conflict. To the contrary, there is every indication they thought such a conflict was impossible given their understanding of the nature and extent of reserved rights, of Congressionally enunciated Indian policy, and of the needs of the Tribe.[8]

There is certainly no indication that they limited the size of the claim advanced or refused to advance claims for fear of conflict. Exhibit U-123, JA 344-347, relied on by the Tribe as sole support for the assertion that the Justice Department attorneys "refused to bring any matter to the court's attention that pitted the interests of the Indians against those of the Newlands Project," was an August 1922 letter from a government attorney, who was stationed in Denver, Colorado, to his superior written in response to a request that he seek immediate court enforcement of the Reservation's irrigation rights. The matter arose only three weeks before final argument in the *Orr Ditch* trial, and therefore before any findings had been made concerning the scope of any of the parties' rights. Because of the stage of proceedings, the government attorney advised his superior that, if approached, the court would undoubtedly order the Reclamation Service to release enough water to satisfy the Reservation's needs and the *historical diversions of the "white ditches"* below the Newlands diversion. The letter infers that a court order to such effect at that time might prejudice the government's contention that these ditch rights were much smaller than the historical diversions. Rather than run that risk, the government attorney suggested that Reclamation Service remedy the situation voluntarily by increasing the flow below Derby Dam. Nevertheless, despite his misgivings, counsel also expressed his readiness and willingness to go to Nevada

[8]The Ninth Circuit's opinion, cited by the Tribe for its contention, itself supports this interpretation of the evidence. Nev. App. 243a-244a.

and ask the court for relief if his superiors in Washington still felt it advisable.

Thus, the "refusal" was neither unequivocal, nor was it the type of prejudicial conflict asserted by the Tribe. Instead, it was motivated by classic notions of litigation strategy related to the timing of the request and the resulting potential prejudice to the government's case against the private ditch owners.[9]

In sum, there is simply no evidence establishing that the government's failure to pursue a right to fish flows in *Orr Ditch* was due to conflict of interest.

The foregoing demonstrates that the Tribe has either misconstrued, misunderstood, or miscited the "evidence" upon which it relies for its contention that the failure to assert a fishery claim was the product of a "massive conflict" of interest. Moreover, the Tribe has ignored circumstantial evidence which points the other way.

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[9]The Tribe also contends that a March 22, 1926, letter, JA 424-425, written by the local Superintendent of the Carson Indian School to Judge Farrington (the judge presiding in the *Orr Ditch* case) seeking his assistance in obtaining a flow into Pyramid Lake for a two-week period put the court "on notice" of a conflict and imposed on it a duty of inquiry into the adequacy of the Tribe's representation. *See* Tribe's Brief at 40-41. There is no evidence that the Judge ever saw this letter, which is not surprising since at the time that the letter was written, the court had already issued its temporary restraining order, had delegated administration of the Truckee River to a watermaster, and was no longer involved in active determination of rights.

The Tribe's suggestion that this letter by a stranger to the litigation rises to the level of notice of conflict which this Court has recognized as triggering a duty of independent inquiry by a court is absurd. *See, e.g., Wood v. Georgia*, 450 U.S. 261 (1981) (issue of conflict raised by state prosecutor in open court); *United States v. Johnson*, 319 U.S. 302 (1943) (issue of collusion raised by formal motion to dismiss on that ground).

There was serious doubt about both the existence and the extent of any *Winters* doctrine right for the Reservation at the time the *Orr Ditch* case was being litigated. JA 266. The *Winters* case had rested upon a treaty interpretation, and had recognized only water rights for irrigation. *See Winters v. United States,* 207 U.S. 564 (1908). Not until 1963 did this Court settle the question of the applicability of *Winters* doctrine rights to executive order reservations, *Arizona v. California,* 373 U.S. 546 (1963), and not until 1976 was that doctrine applied to uphold reserved water rights for other than irrigation purposes. *Cappaert v. United States,* 426 U.S. 128 (1976).

Moreover, at the same time *Orr Ditch* was being litigated, the water right for the nearby Walker River Indian Reservation of the Paiute Tribe was being litigated by the same attorneys. *See United States v. Walker River Irrigation District,* 104 F.2d 334 (9th Cir. 1939). In that litigation the government represented *only* the reservation. Further, the same cutthroat trout fishery and the same tribe were involved, and the reservation was established by the same documents that established the Pyramid Lake Reservation. In fact it was recognized at the time that the facts controlling both reservations were "practically identical." JA 421; *see also* Exh. B-347, RT 475; Exh. B-351, RT 447. Yet no fishery rights were pursued for the Walker River Reservation in that litigation despite the lack of any competing governmental uses of Walker River waters and the absence of any possible "conflict" to discourage assertion of such a claim. JA 518; RT 4460-4461, 4801-4803, 4861-4866.[10]

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[10]The Ninth Circuit attempted to distinguish the situation of the Walker River Reservation from that of the Pyramid Lake Reservation by noting that most of the Walker River Reservation, including Walker Lake, was ceded back to the government prior to that litigation. Nev.App. 221a n.9. This distinction does not with-

What the evidence does show is that there was a profound difference of opinion *within the Office of Indian Affairs* as to the best policy to pursue for the Indians' ultimate welfare. Some local Indian agents at Reno and on the Reservation felt that preservation of the fishery was important. JA 325-338, 385-386, 424-425. The Commissioner and the Washington Office officials, on the other hand, believed that assimilation was the course upon which the Indians' future depended[11] and felt that, in order to achieve this goal, adoption of agricultural and pastoral pursuits was indispensable. JA 434-437; *see also* p. 14, *infra*. But an internal policy dispute wholly within the agency charged solely with furtherance of the Indians' welfare does not amount to a "disabling conflict of interest." Nor does the fact that, in formulating policy, the Commissioner of Indian Affairs took into consideration the national goals of the Reclamation Act. JA 341. While such a consideration may, with hindsight, now be perceived by some to have been inappropriate, nevertheless it simply did not create a conflict of interest.

2. The Tribe Was Not, Itself, Entitled To Notice And An Opportunity To Be Heard In Orr Ditch

The Tribe's position is that once it is factually demonstrated that a conflict existed, then due process concepts required that it be given notice and an opportunity to be heard on its own behalf. As shown above, the Tribe has

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stand scrutiny, however, since even after the cession the Walker River Reservation continued to border on and provide access to the lake and to encompass *entirely* the lower reaches of the Walker River. The ability of the Walker River Band of Paiutes to obtain their sustenance, at least in part, from the fishery continued and was not impacted by the cession. JA 444, 512, 513, 544, 545; Exh. V-466, RT 7491, 8477, 8482; Exh. A-403, RT 4501, 4583.

[11]To this end, the Commissioner also felt that development of the white community nearby would furnish advantages to the Indians. JA 437.

failed to prove factual conflict. Even assuming it could have done so, however, the legal argument of the Tribe is also insufficient to entitle it to relitigate the *Orr Ditch* case.

The Tribe relies principally on three decisions of this Court in support of its contention that the Tribe was itself entitled to, and was denied, notice and an opportunity to be heard in the *Orr Ditch* case: *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Logan v. Zimmerman Brush Co.*, ... U.S. ....., 102 S.Ct. 1148 (1982). But these cases are strikingly dissimilar in the factual and legal situations presented to the Court and provide little or no guidance in the instant setting.

a. Mullane v. Central Hanover Bank Does Not Apply To The Instant Case

In *Mullane, supra,* this Court considered the question of what notice was due to beneficiaries of a trust in a proceeding in which the sole issue was whether the trustee had adequately fulfilled his fiduciary obligation in trust transactions with third parties. The very statutory scheme which established the trust specifically contemplated that, because the proceeding would terminate the beneficiaries' right to any recourse against the trustee for breach of his duty, the beneficiaries would be adversaries of the trustee, and should themselves receive notice of the proceeding. The case has no application to a consideration of whether, and in what circumstances, beneficiaries may have a right to dismantle transactions between the trustee and third parties of which they had no prior notice. Rather, the issue was the adequacy of the statutory notice procedure.

Orr Ditch, in contrast, involved no such termination of trustee responsibility or accountability and no issue of whether trust responsibilities had been fulfilled. Because

no change in the status or responsibility of the trustee was at issue in that case, notice to the beneficiary was not required in order to satisfy due process guarantees. To hold otherwise would undercut the trustee's ability effectively to manage trust property at all, for it would undermine the reliance with which third parties could deal with the trustee and, in fact, discourage transactions involving trust property.

b. Hansberry v. Lee Does Not Apply To The Instant Case

Hansberry, supra, like *Mullane,* and unlike the government-Indian relationship, involved representation very limited in scope and duration. In *Hansberry,* a purported class action, the question was whether representational status existed at all. In class action suits the *only* representational nexus is commonality of interest, and where that nexus does not exist, as it did not in *Hansberry,* the absent party is simply not a member of the represented class. *See generally Restatement (Second) of Judgments* [hereinafter *"Second Restatement"*] § 42 comments at 406-412 (1982). Absent any other connection to the litigation, of course, such a person cannot be bound by its outcome. Furthermore, the class member generally has no recourse against the class representative for breach of duty. By contrast, traditional representative situations, as the *Hansberry* Court took pains to note, generally involve a continuing and well-defined relationship between the representative and the beneficiary, 311 U.S. at 42, 43, and afford judicial remedies for breach of fiduciary duty.

At page 42, footnote 25, of its brief, the Tribe attempts to overcome the distinctions between *Hansberry* and the *Orr Ditch* case by reconstituting *Orr Ditch* as involving class or virtual representation. To accomplish this sleight of hand, the Tribe resorts to a manipulation of the *Second*

Restatement, citing Section 36. *See* Tribe's Brief at 42 n.25.[12]

The *Second Restatement,* in Section 41, makes clear that non-parties are bound by a judgment if represented by either: (1) the trustee of an interest as to which the non-party is a beneficiary, *Second Restatement* § 41(a) (a "classic" fiduciary representative); (2) an official or agency invested by law with authority to represent the non-party's interests, *id.* § 41(d) (a "virtual" representative); or (3) the representative of a class of persons similarly situated, designated as such with the approval of the Court, of which the non-party is a member. *Id.* § 41(e) (a "class action" representative). The rationale for the binding effect of such a judgment is that the non-party is "afforded the opportunity to be heard concerning [the] interests [litigated] through the medium of a representative." *Second Restatement* § 41 comment a.

Comment a goes on to state that while the judgment is binding on the represented non-party, he "may have an action against the representative for breach of his duty to conduct the representation in a faithful, diligent, and prudent way" based upon, *inter alia,* the law of trusts.

Because the United States is the duly vested trustee of the Tribe's interests, and therefore, a "classic" fiduciary representative, Section 41(a) is clearly the classification under which *Orr Ditch* was litigated, and by which its res judicata effect must be determined.

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[12]In a futile attempt to avoid the impact of Section 42(e) the Tribe refers to language found at pages 365-366, which are part of the Reporter's Note to Section 36 of the *Second Restatement.* It must be noted, however, that Section 36 seeks to define the circumstances under which the *representative* of an absent party is precluded from relitigating the same issues when he subsequently seeks to represent his personal rights, or the rights of another as to whom he is a fiduciary. It has no application to the question of whether the *beneficiary* is precluded as a result of actions by his duly constituted representative acting on his behalf.

Section 42 of the *Second Restatement* enumerates the exceptions to the general rule that a non-party is bound by a judgment for or against a party who represents him, laying out categorical exceptions roughly congruent to the representative characterizations found in Section 41.

The Ninth Circuit properly found Section 42(e) to present the only circumstance under which the Tribe could escape the presumptively binding effect of the *Orr Ditch* Final Decree. *See* Nev.App. 237a-238a. That section states that a non-party will not be bound by a judgment in which he was represented by another if "[t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, *and the opposing party was on notice of facts making that failure apparent.*" (Emphasis added.)

The Tribe, however, contends that Section 42(d), which is directed to class action representation, should control the decision as to the applicability of res judicata to preclude the instant litigation.

The comments following Section 42, however, demonstrate its inapplicability. The exception provided is predicated upon the fact that "[t]he representative *authority* of a party appearing on behalf of a class derives principally from the identity between his interests and those of the rest of the members of the described class." (Emphasis added.) The United States' authority to represent the Tribe is not based upon a fortuitous commonality of interest, however, as is that of a class representative. *See Second Restatement* § 41(e). Nor is its authority based upon governmental police or statutorily conferred power to protect the general public interest as is that of a virtual representative. *Id.* § 41(d). Rather the representational authority the United States exercised in *Orr Ditch* is based upon its special legal relationship as trustee of the Indians. *See generally Heckman v. United States*, 224 U.S. 413

(1912). Thus Section 42(d) is simply inapplicable to the instant situation.

By the same token, Comment f to Section 42 makes equally apparent the applicability of Section 42(e). According to that comment, when the representative party is a "classic" fiduciary, because of the existence of permanent and readily enforceable bonds of responsibility to protect the beneficiary, it is the reliance of the opposing party that is of primary importance in determining the effect of the judgment on the beneficiary. By contrast, in situations of "class" representation and "virtual" representation by public agencies or officials, because the nature of the relationship is transitory and readily identifiable to the opposing party, and the absent party has no recourse absent a right to relitigate, the scrutiny appropriately focuses upon the conduct of the representative rather than upon the reliance of the opposing party. *See Second Restatement* § 41 comment d at 397; *id.* § 42 comment f at 411.

In traditional fiduciary relationships, moreover, divergence of interest between the guardian and ward, far from vitiating the relationship, often provides the reason the relationship was established in the first place, as this Court recognized in *Heckman v. United States,* 224 U.S. 413 (1912), decided the year before *Orr Ditch* was initiated. In *Heckman* the Court laid to rest any doubts concerning the scope of the United States' authority to represent Indians in litigation, or the possibility of ineffective judgments in cases in which the Indians had not been joined:

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents . . . . Its efficacy does not depend upon the Indian's acquiescence.
>
> . . . .
>
> The cause could not be dismissed upon [the Indians'] consent; they could not compromise it; *nor could they*

> *assume any attitude with respect to their interest which would derogate from its complete representation by the United States.*
>
> . . . .
>
> But if the United States, representing [the Indians], is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. . . . And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question. (Citations omitted; emphasis added.)

224 U.S. at 444-446.

The completeness of the United States' authority to represent and bind Indian tribes in litigation, the continuing nature of the relationship, and the availability to the Indians of traditional remedies against the fiduciary all are critical distinctions between *Mullane* and *Hansberry*, on the one hand, and the government-ward relationship in *Orr Ditch* on the other hand.

c. The Fact That The Trustee Who Represented The Tribe's Interests In Orr Ditch Was A Federal Official Does Not Elevate Any Breach Of His Fiduciary Duty To Constitutional Status

The Tribe contends that *Logan v. Zimmerman Brush Co.*, ... U.S. ....., 102 S.Ct. 1148 (1982), controls the Court's decision in this action. In *Logan* the plaintiff was denied access to the state court to litigate his employment discrimination claim because, through no fault of his, a state agency inadvertently failed to convene a statutorily man-

dated factfinding conference in a timely manner. The Illinois Supreme Court held that adherence to the statutory procedure involved was a jurisdictional element of the entitlement to sue granted by the state. Thus Logan was denied any hearing on the merits of his claim and this result led to reversal by the United States Supreme Court.

The Tribe's reliance on *Logan* is invalidated by the same factors that distinguish *Hansberry* and *Mullane* from *Orr Ditch*.

First, *Logan* did not involve a trustee-beneficiary relationship; it involved a situation in which only the plaintiff could present his claims and represent his interests. In *Orr Ditch*, on the other hand, the United States had been Congressionally mandated to represent the Indians' interests. Therefore, for the Tribe to rely on *Logan*, it must convince this Court that the Congressional delegation of trustee power was itself an unconstitutional denial of due process, a patently absurd contention. *See* ..... U.S. at ....., 102 S.Ct. at 1158.

Second, like the supposedly represented beneficiary in *Mullane*, Logan was left both without his claim and completely without the legal recourse statutorily contemplated. *See* ..... U.S. at ....., 102 S.Ct. at 1158. The Tribe, on the other hand, because of its more formal, complete, and enduring relationship with its trustee, the United States, has had an avenue of redress for any alleged deprivations caused by its government fiduciary; an avenue which was contemplated in the establishment of the fiduciary relationship and which it has, in fact, successfully employed.

The Tribe also cites *Logan* for the proposition that because the trustee was the *United States*, rather than a private individual or corporation, any breach of its fiduciary duty toward the Tribe "attributable to the acts of federal officials" transcends mere tortious conduct and

achieves constitutional dimension, thereby entitling the Tribe to unwind or void the assertedly wrongful transaction—in this case, the *Orr Ditch* judgment. Tribe's Brief at 39-40. For further support it also cites *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), and *Lugar v. Edmondson Oil Co.*, ... U.S. ....., 102 S.Ct. 2744 (1982).

These cases do not support the Tribe's contention. All three of these cases were brought under 42 U.S.C. Section 1983 which permits an action against an erring "state actor" or official either to prevent or to redress deprivations of constitutional rights. The analogue to these cases, *Davis v. Passman*, 442 U.S. 228 (1979), and *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388 (1971), permits similar actions to redress "civil rights" violations perpetrated by federal officials. But the principal rationale upon which this Court relied to imply a direct Constitutional action, as opposed to a simple tort action, against the federal official was that such an "agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392.

In the instant situation, such greater capacity for harm does not exist. The federal officials apparently charged with misfeasance by the Tribe possessed no greater power or capacity to do harm than would *any* trustee empowered to represent the interests of an absent beneficiary under the law contemporaneous with the *Orr Ditch* litigation. *See Bogert, Trusts and Trustees* §§ 551-553 (2d ed. rev. 1982) [hereinafter *"Bogert"*]. Therefore, the more applicable cases are those which hold that the mere fact that a common law wrong is committed by a government official does not alone elevate the act to one of constitutional proportions. *See, e.g., City of Dawson v. Columbia Ave. S.F., S.D.T.&T. Co.*, 197 U.S 178 (1905); *Heath v. City of Fairfax*, 542 F.2d 1236 (4th Cir. 1976).

3. The Remedy For Any Due Process Violation In Orr Ditch Is An Action For Damages Against The Trustee

The preceding arguments demonstrate that the government's failure to pursue a right to fish flows in *Orr Ditch* was not the result of any "conflict of interest" as the Tribe has contended. Further, even if one assumes, for the sake of argument, such a conflict had existed and had deterred the litigation of such a claim, the failure to pursue the fishery claim still would not have amounted to a constitutional violation, but merely a common law tort remediable by legal action against the trustee. Even assuming *arguendo* that a breach of the United States' fiduciary duty to the Tribe might violate due process guarantees, however, it does not necessarily follow that the remedy is to unwind the transaction, as the Tribe implies from its reliance on *Logan v. Zimmerman Brush Co.*, ... U.S. ....., 102 S.Ct. 1148 (1982).

The Tribe's reliance on *Logan* as controlling wholly ignores this Court's recognition that due process guarantees can be satisfied by the availability of a remedy against the wrongdoer. Whether "pre-deprivation process" is required depends on the circumstances of the case, including such considerations as "the impracticability of providing any meaningful predeprivation process," the availability of some meaningful avenue of redress after the taking has occurred, *i.e.*, post-deprivation process, *see Parratt v. Taylor*, ... U.S. ....., ..., 101 S.Ct. 1908, 1914-1915 (1981),[13] and the balance between governmental and private interests that would be affected by imposing a requirement for pre-deprivation process. *See, e.g., Logan v. Zimmerman,*

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[13]Although the *Logan* Court distinguished *Parratt*, ... U.S. at ...., 102 S.Ct. at 1158, it did so on the basis that *Logan* was challenging the state procedure responsible for his loss. The inference was, therefore, that had his loss been solely the product of official negligence with regard to a decision on the merits of his claim, a state tort remedy would have provided sufficient process.

..... U.S. at ....., 102 S.Ct. at 1157, 1158; *Wolff v. McDonnell*, 418 U.S. 539, 560, 567-568 (1974).

One of the purposes served by the concept of legal representatives is to give stability and enforceability to transactions involving third parties and the trust property where the beneficiaries lack the capacity to act on their own behalf. Protection of the beneficiaries' interest is provided for by the remedy of suit *against the fiduciary*. Where property has been conveyed by the fiduciary to innocent third parties for valuable consideration, suit against the trustee for damages is the *sole* remedy; the innocent third party is entitled to rely on the transaction, and due process is not offended. *See* 4 *Scott on Trusts* § 284 at 2342, *et seq.* (1967); *Bogert, supra* § 861 at 16-17; *id.* § 862 at 27-32. *See also* 18 Wright & Miller, *Federal Practice and Procedure (Civil)* § 4454 at 459 *et seq.* (1981).

It would be anomalous if parties to the *Orr Ditch* case were *less* entitled to rely on the stability of a court adjudication of property rights than they could upon a naked transaction with the fiduciary. One would expect the opposite to be true. *Hopkins v. Hebard*, 235 U.S. 287 (1914).

4. The Tribe Has Received That Process To Which It Is Due

There is no reason to step outside normal trust principles to rectify any wrong alleged in this case, whether that wrong be denominated a breach of constitutional due process guarantees or simply a tortious breach of fiduciary duty. The same remedies available to beneficiaries in other trust situations are also open to the Pyramid Lake Paiutes. It was precisely to remedy such breaches that Congress passed the Indian Claims Commission Act. The House Report accompanying the bill stated that

> the present generation of Indians is entitled to claim the funds that were set aside for them, in place of the lands they would own today if the transactions had not

> been consummated. If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated *or other fiduciary duties have been violated,* we compromise the honor of the United States. (Emphasis added.)

HR 1466, 79th Cong. 1st Sess. at 5. Indeed the Tribe has availed itself of this and other remedies with respect to the very water rights here in issue.

In 1952 the Tribe filed a claim against the United States with the Indian Claims Commission to recover damages for loss of the very water right it seeks to assert in the instant action. In its More Definite Statement of Claims filed with that Commission, the Tribe specifically pinpointed its claim:

> 3. Loss of Water *and Water Rights* of the Pyramid Lake Reservation and Destruction of the Fisheries of Pyramid Lake.
>
> *It is claimed that* as of November 1859, the date of establishment of the Pyramid Lake Reservation, there were reserved to the Northern Paiute tribal groups which were located on that Reservation, rights to sufficient water from the Truckee River to maintain Pyramid Lake at a level adequate to preserve the fishery therein and that the *United States is liable to pay compensation and damages by reason of its misfeasance in taking, diminishing and diverting water and water rights which were so reserved and in destroying the fisheries of Pyramid Lake.* (Emphasis added.)

Exh. B-448 at 37-38, RT 7887.

Further, the Commission itself clearly recognized that the case before it concerned water rights, for it specifically stated that the Tribe was seeking redress for actions or misfeasance which had deprived the Tribe of "water *rights* reserved to it." (Emphasis added.) 30 Ind.Cl.Comm. 210

(1973). The Commission found that the United States had an obligation to prevent such loss and ordered that the case proceed to trial to determine if the government had failed to discharge its obligations and, if so, the extent of the resultant damages. *Id.*

No trial was held, for in ensuing negotiations between the Tribe and the United States, the Tribe accepted the sum of $8,000,000 as full compensation for its asserted loss. Incredibly, in the stipulation for entry of final judgment on the claim the two parties disingenuously attempted to recharacterize the Tribe's claim. They belatedly disavowed that the Tribe had ever asserted any claim or sought compensation for any loss or diminution of reserved water *rights*. At the same time, however, the Tribe generously accepted the $8,000,000 in full settlement of all "water claims" previously asserted. Contrary to the Commission's prior opinion and the Tribe's express statements in prior pleadings, the parties stipulated that the Tribe "did not sue here for damages or compensation for the loss, diminution or taking of any such reserved water rights" and that "no part of the award of damages . . . represents damages or compensation for the loss, diminution or taking of any water rights." JA 492. In the same breath, however, the Tribe expressly covenanted that

> should it be finally determined that, by reason of acts or omissions of the United States done or occurring prior to the execution hereof, water rights once reserved for the Pyramid Lake Indian Reservation were lost, taken, subordinated to other rights or otherwise diminished, *it will not again sue the United States to recover additional damages or sue for compensation for the loss, . . . of such water rights.* (Emphasis added.)

JA 493, 494.

In its Findings of Fact on the Compromise Settlement, the Indian Claims Commission merely noted the "opinion" of the parties that no water rights reserved to the Tribe had been lost, but held that "the judgment by the Commission pursuant to the settlement shall finally dispose of and bar . . . any and all claims for damages or compensation for the loss . . . of water rights" reserved in connection with the Pyramid Lake Reservation. JA 490.

The pleadings on record with the Indian Claims Commission and the Commission's express ruling make clear that the Tribe had and utilized an adequate remedy against its trustee for any loss of water rights it may have suffered. It both asserted its claim and accepted in settlement a sum it thought just. That the Tribe chose voluntarily to waive or abandon (for $8,000,000) its remedy as to a portion of the claim it asserted does not render the remedy inadequate for due process purposes.

5. The Relief Sought By The Tribe Is Impracticable And Frustrates The Purposes Of Trust Relationships

TCID believes that it has clearly demonstrated the absence of a conflict in *Orr Ditch*. Nonetheless it feels constrained to address the Tribe's request for a remedy. For purposes of this argument only, then, TCID will assume that a conflict has been proven.

The Tribe's contention that due process guarantees have preserved its cause of action against defendants amounts to an argument that trust beneficiaries must be afforded "pre-deprivation" notice and opportunity to be heard whenever their trustee has a conflict between his own and the beneficiaries' interests. Whatever the abstract appeal of such a principle may be, it is simply unworkable as a rule of law.

As has been pointed out elsewhere in this brief, one of the principal purposes served by the law of trusts is to enable third parties to deal with the trust property with

reliance on the stability of their transactions. This purpose is not undercut by the beneficiaries' remedy of voiding such transactions where the third parties are aware of breaches of the trustees' duties. *See* pp. 25-26, *infra*. But the Tribe's suggested remedy goes far beyond that recognized doctrine and seeks to void transactions and even court judgments involving innocent third parties who *reasonably relied* on the apparent propriety of the trustee's conduct. If it were to grant the Tribe the relief it seeks, this Court would deny third parties the benefits of stability of transactions and judgments which the legal fiduciary relationship was designed to create.

Further, the relief advocated by the Tribe is impracticable at best. A third party dealing with trust property would be required to investigate fully the nature and extent of the trust property and the trustee's own private interests, to ascertain whether any conceivable charge of conflict might in the future arise to invalidate the transaction, and would have to identify and locate every beneficiary so they could be given notice to insure the finality of the transaction. Further, because the Tribe's situation arises from assertion of interests not recognized at the time of *Orr Ditch,* third parties presumably would be required to investigate and ascertain not only existing interests of the trustee and beneficiary, but would additionally be required to speculate on whether, and how, changed circumstances or future judicial decisions over the course of coming decades might alter those interests in relation to each other. A third party failing to indulge in such exhaustive investigation and speculation would run the risk of having the transaction voided because of the trustee's "wrongdoing" of which he was not, and could not have been, aware.

Simply to state the burdens which the Tribe's due process rule would impose on third parties is to recognize its infeasibility. First, it would damage, rather than ad-

vance, the interests of beneficiaries by subjecting trustees' private affairs to exhaustive scrutiny by others, which could only discourage assumption of trust responsibilities by potential fiduciaries. Second, the investigative burdens coupled with the unattainable certainty required to assure the validity of any transaction involving trust property would, in all probability, deter third parties from dealing with trust property at all.

The Ninth Circuit recognized, in part, the tremendous injury to third parties which relitigation would engender; but suggested that, to the extent water rights would be forfeited by the Newlands farmers as a result of the court's opinion, their remedy would be a damage claim against the government for breach of their water right agreements. Nev.App. 245a-246a. This cavalier relegation of injured third parties to damages against the trustee fails properly to consider the enormous *indirect* reliance by society at large on the finality and stability of trust transactions which must enter into the Court's determination of what process is due. *Wolff v. McDonnell,* 418 U.S. 539, 560 (1974). Communities have been established and millions of dollars of public funds expended for governmental facilities based, in major part, on the finality of the *Orr Ditch* Decree. Further, the hundreds or thousands of businessmen and their families who have invested and built lives and businesses based on the existence of a large agricultural community in northwestern Nevada have heavily relied on the *Orr Ditch* adjudication. *See* JA 258-259. These communities and their residents and these businessmen and their families would have *no* recourse against the United States for their devastating economic injuries.

The only remedy which would ensure recompense to *all* the injured persons and entities is to recognize that "post-deprivation" remedies traditionally available to trust beneficiaries by an action against their trustee satisfy the due process guarantees of the Constitution.

B. The Record Does Not Support The Tribe's Contention That The "Fishery Water Right Claim" Was Outside The Scope Of The Orr Ditch Reserved Right Claim

The Tribe's contention that a portion of the Reservation water right claim was withheld from the *Orr Ditch* action instituted by the government is unsupported by the evidence, contrary to the findings of the courts below, and is totally incompatible with the evidence in the record and with the facts conceded by the Tribe.

The overwhelming weight of evidence demonstrates that the government attorneys in *Orr Ditch* intended to bring a comprehensive water right suit which would "adjudicate all of the water rights on the river in Nevada." Exh. U-10 at 13, RT 1042-1059. In explaining his choice of a federal quiet title action instead of Nevada's *in rem* statutory adjudication procedure, Truesdell, the United States attorney in charge of the *Orr Ditch* case, wrote that

> only in that way, as we see it can [the determination] have the requisite certainty and finality and be binding on all concerned, including the government itself . . . .
>
> In coming to the above conclusion the proceeding before the State Engineer was carefully considered *and the interests of those who will be parties to the suit other than the government have been kept in mind and I believe safeguarded.* (Emphasis added.)

JA 280-281. At about the same time he wrote the representative of the Commissioner of Indian Affairs that he understood "the necessity of securing as large a right for the reservation lands as possible, and . . . planned to plead liberally so as to accomplish that purpose and at least not to foreclose any proper claim the Government can make." JA 277.

To carry out this intent, the government's *Orr Ditch* complaint alleged all the purposes, including "fishing,"

of the Pyramid Lake Reservation, which was described as being comprised of "about three hundred and twenty-two thousand (322,000) acres of land in Washoe County, in the State of Nevada, . . . *together with Pyramid Lake* and a part of Winnemucca Lake." (Emphasis added.) Nev.App. 2a, 6a. It then claimed that 500 cubic feet per second of Truckee River waters had been reserved by it for the Reservation in fulfillment of those purposes. Nev. App. 7a, 8a.

Thus it is clear from the complaint that *all* of the Reservations *lands, including Pyramid Lake,* and *all* of the Reservation *purposes, including fishing,* were comprehended in the reserved water right claim put in issue by the United States' complaint. That the government may have failed later to present evidence on any part of its claim does not remove that portion from the cause of action asserted.

Once the complaint had been filed and served, answers and counterclaims against the United States were filed by "substantially all the defendants" in the case. JA 297; *see also* JA 299, 311; Exh. B-462, RT 353. By order of the court, those counterclaims were deemed effective to put at issue the right of defendants *inter se* as well as to afford the defendants affirmative relief against the United States. JA 310-312. Virtually all of the rights asserted by defendants in their counterclaims were senior to the Newlands Project right asserted by the government and junior to its asserted Reservation right. The Tribe has conceded, indeed argued, that the effect of such counterclaims was to require the United States to put at issue all of its claims adverse to those of the counterclaiming defendants. *See* Tribe's Brief at 35-36. Thus, such counterclaims required the United States to assert or to lose the full measure of its senior Reservation water right.

To conclude that an important part of the government's most senior water claim was omitted from the litigation is

not only inconsistent with the stated intent of the government attorneys; it is incompatible with the goals of the litigation, its history, and subsequent related governmental actions as well.

The very purpose for which the Tribe asserts that the United States initiated *Orr Ditch* was "to secure water rights for the Newlands Project." Tribe's Brief at 26. That purpose would have been utterly defeated had an early priority water right remained outside the scope of the decree. Had that been the case, the promised certainty and finality of the rights decreed, not only for the Newlands Project, but for all of the private defendants as well, would have been but a cruel hoax.

Furthermore, the actions of the United States since 1922, when the Tribe alleges the government first became aware of the possibility of a fishery right, point to its awareness of inclusion of the claim within the scope of the *Orr Ditch* litigation. The Office of Indian Affairs had been repeatedly informed that no Truckee River waters which could be utilized for irrigation would be allocated by the Reclamation Service for fish preservation. *See* JA 322, 424, 439, 444, 455-457, 472. Yet *for fifty years* the government never attempted to pursue such a right—either in *Orr Ditch*, in negotiations for the Truckee River Agreement, or in separate litigation—even though the destruction of the fishery was a matter of widespread knowledge and concern during this entire period, and even though determination of such a right could be expected to affect profoundly virtually every other water claimant on the River. Such quietude on the part of the government is consistent only with its awareness that such a claim was comprehended in and barred by the *Orr Ditch* claim and judgment. *See* JA 444, 472.

Similarly, the Tribe itself, which was organized in 1936 and was aware of the fishery-irrigation conflict since at least that time, also took no steps to assert a claim to water

rights for fishery purposes for more than thirty years. That it, too, understood any fish flow claim to have been concluded by *Orr Ditch* is evident from the claim it filed with the Indian Claims Commission. *See* Exh. B-448, RT 7887; *see also* JA 471-473.

Finally, since entry of the *Orr Ditch* Final Decree, the federal government, the Tribe, and the State of Nevada, have taken a number of remedial steps to restore the Pyramid Lake fishery within the confines of the *Orr Ditch* decree. *See* JA 509-510. As a result, three fish hatcheries have been built to permit artificial reproduction; a channel and fishway have been constructed through the Truckee River delta; and a major upstream storage facility, the Stampede Reservoir, has been built to provide artificially augmented fish flows. The federal government alone has spent more than $31,000,000 on these facilities, none of which would be necessary if the claimed reserved "fishery water right" had been preserved outside the *Orr Ditch* Final Decree.

C. The Reserved Water Right For The Pyramid Lake Reservation Is A Single Cause of Action

The Tribe initially argues that the cause of action it now seeks to assert in this litigation is necessarily different from the cause of action asserted on its behalf in *Orr Ditch*, and cites this Court's decision in *Montana v. United States*, 440 U.S. 147 (1979), as so holding. It also cites, in support of that proposition, cases which hold that an Indian tribe may litigate on its own behalf, without the presence in court of its guardian, the United States. *See* Tribe's Brief at 21.

But this argument and these citations misconceive the issue completely. The issue is not whether, *in the absence of the United States' involvement* in the litigation, the Tribe could have litigated on its own behalf. Nor is the issue whether a non-party which has no legal representational relationship with a party in an action should be

bound by the decision in that action due to his off-the-record participation and control of it, as was the case in *Montana.*[14] As this Court has repeatedly recognized, once the United States does embark upon litigation of the Indians' interests, the Indians are bound thereby and precluded from later relitigating the same matter. *See, e.g., Heckman v. United States,* 224 U.S. 413 (1912); *Poafpybitty v. Skelly Oil Company,* 390 U.S. 365, 370 (1968).

The issue to be decided herein is whether the Tribe's cause of action, which the United States asserted as its guardian in *Orr Ditch,* is the same cause of action which it now seeks to assert on its own behalf. That question cannot be answered simply by looking to see who was physically in court in *Orr Ditch.* For this Court to hold otherwise would destroy the concept of representative litigation, since the represented party would, under the Tribe's formulation, *always* be free to relitigate claims a second time.

1. The Restatement Of Judgments Supports The Finding Of A Single Cause Of Action In Orr Ditch

The Tribe cites Section 61 of the *Restatement of Judgments* (1942) (hereinafter *"First Restatement"*) for the proposition that the fishery and irrigation rights of the Reservation would be considered separate causes of action based on the "same evidence test" extant at the time *Orr Ditch* was litigated. But an examination of the *First Restatement* discloses the fallaciousness of this argument.

In the first place, as the *First Restatement* itself points out, the "same evidence test" is conclusive as a positive,

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[14]In *Montana,* the United States, the non-party in the prior action, would not have been bound by the judgment but for its control of the litigation. This situation of a controlling non-party, discussed in Section 39 of the *Second Restatement* at 382-390, is wholly distinct from the situation in which a non-party is bound because of the presence in the action of his legally constituted representative. *See Second Restatement* § 41 at 393-405.

but not as a negative, test for determining identity of claims. *First Restatement* § 61 comment a at 240; *see also F.L. Mendez & Co. v. General Motors Corp.*, 161 F.2d 695, 698 (7th Cir. 1947). Thus the different character of some of the evidence which might be offered in this action simply does not show that the right asserted herein and the right asserted in *Orr Ditch* are different causes of action.

The *First Restatement's* approach was basically a transactional one. *See First Restatement* § 61 comment a. The transaction is identified primarily by examining the evidence needed to prove an *entitlement* to relief. This is substantially and necessarily different than identifying a transaction or cause of action by the evidence required to prove the *measure* of relief, as a reading of comment a to Section 61 clearly demonstrates:

> Thus, if the plaintiff suffers harm to his person and property in an automobile collision and brings an action for the harm to his person, a judgment in that action precludes him from maintaining a second action for the harm to his property, although under the pleadings evidence of this harm was inadmissible in the first action.

First Restatement at 241.

The analogy is clear. The Tribe's claim arises from a single transaction: Interference, by wrongful diversion, with the use of water reserved for the benefit of the Pyramid Lake Tribe. The right alleged is to the use of Truckee River water for the benefit of the Tribe, and the wrong alleged is the diversion of water upstream which interferes with the exercise of that right. That more than one interest may have been affected by such wrongful diversions, and that proof supporting damage to a fishery interest differs from proof supporting damage to an irrigation interest

does not create multiple causes of action any more than would separate proof of personal and property damage.[15]

Moreover, the "same evidence test" was only one of a number of tests used at the time of *Orr Ditch* to identify congruence of claims. Other formulations included whether a primary right had been infringed by a single wrong, *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316 (1927), and whether rights established by the first action would be impaired by a judgment in the second action. *Schuykill Fuel Corp. v. B.&C. Nieberg Realty Corp.,* 250 N.Y. 304, 165 N.E. 456 (1929). Both of these tests also support the conclusion that the claim advanced in *Orr Ditch* is the same as that asserted in this action.

The exceptions to the rule against splitting a cause of action are explained in Section 62. They include situations in which essential procedural elements precluded plaintiff from litigating the entire claim, situations in which defendant's misrepresentation prevented full litigation, or where defendant had consented to the split.

None of these exceptions would have permitted the United States to split its cause of action for the Reservation water right. First, the record shows that, at the time of *Orr Ditch,* Nevada law made available to the United States statutory adjudication procedures which it expressly declined to utilize. JA 280-281; Exh. U-10 at 13, RT 1042, 1059. Even though a state adjudication was eschewed, in the context of the general equity action which it employed, the United States was no more precluded from advancing a Reservation "fishery right" than it was a Reservation "irrigation right." If either claim was justiciable, both were.

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[15]Section 62 of the *First Restatement* provides further illustrations, explaining, for example, that where one has a claim for a number of overdue items on an account and sues to recover only one, he cannot thereafter maintain an action to recover an item which was not included in the prior action. *Id.* comment h, illustration 13 at 252.

Second, even if the Tribe had demonstrated that the United States' failure to present evidence of fish flow requirements in *Orr Ditch* was the product of mistake, *see* pp. 11-21, *supra*, that mistake was not the product of defendants' misrepresentation, either those in *Orr Ditch* or those in the instant case. This exception to the rule against splitting causes of action is therefore inapplicable.

Finally, given the expectations of all concerned that the adjudication would be comprehensive and final, it is clear that the defendants did not consent to the United States' splitting its cause of action.

Additionally, under the then-prevailing equity pleading practice, the United States was required to assert *all* of its Reservation rights in that action, even if such rights could otherwise be considered separate claims as the Tribe argues.[16]

Thus, even under the law applicable at the time, the only possible conclusion is that the full measure of the Pyramid Lake Reservation water right was at issue in *Orr Ditch* and may not be asserted again in this action.

2. The Second Restatement Of Judgments Supports The Finding Of A Single Cause Of Action in Orr Ditch

The Tribe further contends that even under the criteria stated in the *Second Restatement* the claim asserted in this action differs from that asserted in *Orr Ditch*. Tribe's Brief at 26. An examination of the two claims under each of the criteria therein set forth, however, amply demonstrates this contention to be baseless.

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[16]As stated in Fletcher, *Equity Pleading and Practice* Section 297 at 323 (1902), under legal principles prevailing at the time of *Orr Ditch*, a defendant, in answer to a bill in equity, was required to put in issue "all circumstances of which he intends to avail himself by way of defense." Further, according to Section 906 at page 967, cross bills, predecessors to counterclaims, "differ in nothing

Section 24 of the *Second Restatement* identifies factors to be considered in determining what constitutes a single claim:

> . . . whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Second Restatement at 196.

The Tribe contends, essentially, that because the evidence concerning the quantity of flow necessary for fish reproduction differs in time, space, origin, and motivation from the evidence of water necessary for irrigation, the first of these criteria is not met.

Yet, the critical facts surrounding the claim concern the date on which the Reservation was established, the location of the Reservation to which the asserted water right is appurtenant, and the purpose for which the Reservation was set aside. All of these facts, common to both claims, are identical; only the evidence supporting the amount of entitlement is different.

The fact that evidence of damages may differ, however, does not make the claims upon which the damages are predicated different, as the next succeeding *Second Restatement* section makes clear.

Comment c to Section 25 explains that

> if a plaintiff who has recovered a judgment against a defendant in a certain amount becomes dissatisfied with his recovery and commences a second action to

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from original bills, except that they are occasioned by former bills." *See also* JA 296, 297, 310, 311; Exh. B-462, RT 353. Since "substantially all" of the *Orr Ditch* defendants filed counterclaims against the United States, JA 297-299, the United States was required to assert *all* claims which might have defeated the counterclaimants' claims of entitlement. *See* p. 38, *infra*.

> obtain increased damages, the court will hold him precluded; his claim has been merged in the judgment and may not be split . . . *It is immaterial that in trying the first action he was not in possession of enough information about the damages, past or prospective,* or that the damages turned out in fact to be unexpectedly large and in excess of the judgment. (Emphasis added.)

Thus it is clear that the mere fact that the proof of the amount of water required by fish differs from the proof of the amount of water needed for irrigation does not transmute the Reservation claim into a new cause of action any more than does a belated attempt to prove property damage arising from a previously tried automobile accident case in which only personal injury damages were asserted. *See also First Restatement* § 62 comment e at 247-248. In the context of the instant case, a contrary conclusion would result in a separate cause of action for each crop that required a different water duty or each fish species that required a different water flow.

The Tribe next argues that the fishery claim and the irrigation claim would not have formed a convenient trial unit in *Orr Ditch*, since "the government's primary purpose . . . was 'to secure water rights for the Newlands Project'" and a claim for a fishery water right "would have interfered" with that goal. Tribe's Brief at 26-27. Merely to state the argument reveals its absurdity. If a prior fishery right would have interfered with the Project right, how could the United States possibly have secured the Newlands right *without* including and quantifying this prior right? To have omitted such a claim would have rendered the entire thirty-year litigation a futile exercise.[17]

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[17]Nor is there any merit to the Tribe's contention that the fishery claim would have been non-justiciable had it been included. That claim, like the irrigation claim, would have had one of the earliest priorities on the river and would have been opposed by virtually every private diverter.

It may have been an awareness of this very fact which prompted the Reclamation Service to urge the government attorneys to include the Reservation claims in the *Orr Ditch* litigation in the first place. JA 271-272; *see also* p. 9, *supra*. Not only was an inclusion of all of the Reservation's water claim as well as the Newlands claim a "convenient" trial unit, it was the *only efficacious* trial unit.

Finally, the Tribe argues at pages 30-37 of its brief, that the parties to *Orr Ditch* should have *expected* that they had not accomplished the comprehensive water right adjudication that "was intended by all concerned, lawyers, litigants, and judges," Nev.App. 185a, solely because of a potential "fishery water right" claim of which no one was aware until after the case had been tried, if then. Tribe's Brief at 27 n.15.

The overwhelming bulk of statements and assurances by the government attorneys responsible for the *Orr Ditch* litigation are to the effect that they intended the case to approximate an *in rem* statutory adjudication in which all rights would be determined, *see* JA 280-281, 287-293; Exh. U-10 at 13-15, RT 1042, 1059, that the private parties' interests would not be prejudiced by the selection of a federal court action in lieu of the available Nevada state statutory adjudication, JA 281, and that the Reservation right would be pled liberally so as not to foreclose any proper claim the government could make. JA 277. As a result, both the District Court and the Ninth Circuit found that the parties intended *Orr Ditch* to be a "general all-inclusive water adjudication suit" which would finally determine "all rights and claims in and to the waters of the Truckee River." Nev.App. 185a, 225a; *see also id.* at 145a.

This avalanche of evidence and unanimity of finding is acknowledged by the Tribe as "undoubtedly a relevant factor" in determining the parties' expectations. Tribe's Brief at 31.

Standing alone on the other side is a single letter, written four years after the close of testimony by a govern-

ment attorney who had neither pleaded nor tried the case, in response to a critical inquiry from his superior and from a Congressman, stating that nothing in the pleadings or testimony concerned fish or water for fish flows.[18] JA 393-394. Incredibly, this letter is cited by the Tribe as "the *only* specific evidence of the parties' expectations." (Emphasis added.) Tribe's Brief at 31.

There is no evidence that this letter was ever made public or that the *Orr Ditch* defendants were even aware of it. And, certainly, neither the United States nor the parties ever took any action consistent with a view that an enforceable "fishery water right" existed outside the scope of the *Orr Ditch* litigation. *See* pp. 11-15, 39-40 *supra.*

The Tribe next argues that the parties did not expect all Reservation claims to have been litigated because of then-prevailing standards for determining identity of claims and principles governing quiet title actions. *See* Tribe's Brief at 31. These arguments have been refuted earlier in this brief, *see* pp. 41-44, *infra,* and will not be repeated here except to point out that because of the counterclaims filed against the United States, if for no other reason, the parties could legitimately expect that the United States had asserted *all* its claims and that any additional claims would be thereafter barred.

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[18]The attorney, Ward, was simply wrong concerning the scope of the *Orr Ditch* complaint. The amended complaint specifically mentioned protection of the Indians' fishing as one of the purposes for which the United States had set aside the Reservation and for which it claimed 500 cubic feet per second of Truckee River flow. Nev.App. 6a-7a. Furthermore, fishing was also referred to in some of the exhibits admitted in the case. *See* Exh. B-477, RT 364, 366. The *Orr Ditch* complaint had been prepared by Ward's predecessor, John Truesdell, and the case was tried by another predecessor, R.G. Withers, and many of the pleadings and records were, at the time of Ward's letter, not in Ward's possession. Thus, his lack of extensive familiarity with the case may explain the inaccuracies in this letter. Furthermore, the attorney did *not* state that a claim for such flows could still be made, and, in fact, suggested obtaining such flows by accommodation, not by litigation.

Finally, the Tribe relying on Section 36 of the *Second Restatement*, argues that, because it was apparent that the United States was representing both the Tribe and the Newlands Project, the parties could not legitimately have expected that all Reservation claims would be asserted and finally determined in the adjudication. The Tribe's reliance is however, misplaced. *See* p. 24 n. 12, *infra*.

The United States was appearing in the *same capacity* in which it appears in this case, as trustee for the Tribe. Thus, the parties could expect that any position taken by the United States in that representative capacity, the only capacity in which it could litigate the Reservation's water rights, and any judgment obtained against or by it in that capacity, would be final and binding both upon it and upon the Tribe in any future litigation concerning those rights. *See Heckman v. United States,* 224 U.S. 413 (1912).

In sum, the Tribe's contention that, under modern views, the present claim and the *Orr Ditch* claim are separate and distinct causes of action fails every test.

D. The Goal Of Certainty In Western Water Rights Compels The Finding Of A Single Cause Of Action In Orr Ditch

Under either the modern or more dated tests the definition of a water right claim urged by the Tribe would place beyond reach the most critical goal in western water administration—that of certainty of water rights. *See* Brief of Petitioner Truckee-Carson Irrigation District at 31-33. To hold, as the Tribe contends, that a separate and distinct water right claim exists for each purpose for which water is reserved would permit endless relitigation of water rights, limited only by the inventiveness of the parties and their lawyers in conceiving and describing purposes of use not previously asserted.

The more functional and beneficial approach, in terms of fostering the goals of certainty and reliability in water

rights, is to view the reserved water right of each reservation as a single claim, particularly since each was created by a single act whose purposes are ascertainable and unchanging from one litigative opportunity to the next. Under this view, the Pyramid Lake Reservation water right claim was asserted and litigated in *Orr Ditch* and cannot now be litigated again.

IV

CONCLUSION

As TCID has demonstrated, the facts, the law and policy support a finding by this Court that the claim the United States and the Tribe seek to assert in the instant case is inseparable from the claim of reserved water rights asserted by the United States on behalf of the Tribe in *Orr Ditch*. Further, the errors, if any, that may be assigned to the United States' conduct in that litigation did not arise from conflict of interest and, in any event, do not warrant the nullification of a comprehensive water right decree which has governed the life and economy of an entire region for decades. Accordingly, the judgment below should be affirmed insofar as it upholds the validity and comprehensiveness of the *Orr Ditch* Final Decree.

Dated: February 11, 1983.

Respectfully submitted,

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APPENDIX A

Joint Appendix	Reporter's Transcript Offered	Admitted
263	1042	1059
264-270	1042	1059
271-27[illegible]	255	304
275-277	249	249
279-281	422	422
282	1042	1059
294-309	246	246
310-312	358	358
313-316	300	300
318-320	1044	1059
321-324	265	265
325-334	1044	1059
335-338	300	308
339-341	259	259
342-343	262	262
344-347	4501	4583
348-356	260	270
357-358	1045	1059
359-361	300	308
362-365	255	304
376-384	[illegible]	242
385-388	300	308
393-394	427	428
395-409	235	235
424-425	300	308
430-438	9151	9162
439	1046	1059
444	1046	1059
445-449	4501	5583
455-457	9151	9162
461-462	437	437
465-466	441	441
469-470	9151	9162
471-473	4501	4583
488-508	7888	7897
509-510	1017	1018
512	8478	8482
513	8478	8482